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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 15 1996

Federal Communications Commission
Office of Secretary

In the Matter of)
IMPLEMENTATION OF THE) CC Docket No. 96-128
PAY TELEPHONE RECLASSIFICATION)
AND COMPENSATION PROVISIONS OF THE)
TELECOMMUNICATIONS ACT OF 1996)

REPLY COMMENT OF ROBERT M. BRILL, ESQ.

TO

NOTICE OF PROPOSED RULEMAKING

Adopted: June 4, 1996

Released: June 6, 1996

JULY 15, 1996

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SUMMARY OF REPLY COMMENT

This reply comment is respectfully submitted with regard to the proposed rulemaking that the Federal Communications Commission has undertaken under the mandate of the Telecommunications Act of 1996. The comments submitted herewith are principally directed at the comments of the following: i) The RBOC Payphone Coalition, dated July 1, 1996 ("*Coalition*"); ii) the New York State Department of Public Service, dated June 24, 1996 ("*NYSDPS*"); iii) the Department of Information Technology and Telecommunications ("*DoITT*"), dated June 25, 1996 ("*DoITT*"); iv) AT&T, dated July 1, 1996 ("*AT&T*"); v) the International Telecard Association, dated July 1, 1996 ("*ITA*"); vi) MCI Telecommunications Corporation, dated July 1, 1996 ("*MCI*"); vii) Sprint Corporation, dated July 1, 1996 ("*Sprint*"); vii) the Intellicall Companies, dated July 1, 1996 ("*Intellicall*"); and viii) the Personal Communications Industry Association, dated July 1, 1996 ("*PIA*").

As the submission of the Regional Bell Operating Companies evidences, a wondrous thing happens to the former monopolist when it is thrust into a truly competitive environment -- it becomes one of the loudest champions for competition. Much of the contents of *RBOC* is unobjectionable to PPOs, because now the regional Bells will be owners of payphones on a directly equivalent basis as their competitors. However, on one key issue, *RBOC* argues a position that forces the use of the word "equivalent," not "equal." That is the valuation of the payphone assets of the Regional Bells. *RBOC*, pp. 23-30. This reply comment takes exception with a valuation

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frame-work that does not account for the value of the preferential payphone locations that the Regional Bells were able to obtain from their monopoly positions. In this regard, the analogy of the "Cheshire Cat" is not apt. *Id.*, at 50. Rather, it is the cat that swallowed the canary with the cat being the Regional Bells, and the canary being the payphone market.

This reply comment also takes exception to the positions contained in *AT&T*, *ITA*, *NYSDPS*, and *DoITT* with respect to per call compensation. It agrees with the proposition contained in *PCIA*, at 4, that the public's expectation of what the price of a call from a payphone is will not be that contained in the minds of regulators, trapped in the past. In essence, this Reply Comment agrees with the view, "Why do you think they call it a payphone?" *See, PCIA*, p. 4.

Finally, this reply comment will take issue with the views, contained in *NYSDPS* and *DoITT*, that state and local regulators are the best arbiters for matters with respect to per call compensation and PIP compensation.

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INTRODUCTION

I represent private payphone owners ("PPOs") located in the New York Metropolitan area, a corporation engaged in the development of a wireless payphone, and a lender to PPOs. I respectfully submit this reply comment with regard to the above-captioned rulemaking (the "Payphone Rulemaking").

As all the comments submitted by telecommunications businesses with regard to the Payphone Rulemaking evidence, the Telecommunications Act of 1996 (the "1996 Act") has changed forever the dynamic in the payphone industry. A free market with competition as its lodestar will govern a universe in which the PPO and the LEC payphone will be absolutely similar. Both will have the same concern -- insuring that any and all uses by the public of the PSP will be fairly compensated. Clearly, those entities that will no longer have a free ride for making money by exploiting PSPs (the telecard industry and the long distance carriers) are concerned. In addition, certain regulators, such as state public service commissions and local regulators, are concerned at surrendering the scope of regulation to a nationally set, competitive pricing mode, whose mission is genuine competition, not some set of faux competition in which the regulator takes into account some public expectation that the regulator imagines in his or her head. These regulators are afraid of the most democratic method of determining public expectation -- the public's willingness to use payphones priced by free market competition to account for real costs. These regulators have coddled the public so long about the artificially low pricing of PSP use, that they expect a backlash

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when the public has to pay for all aspects of payphone use (with the exception of 911 emergencies or the compliance with the Americans with Disabilities Act). These regulators had at least a decade or more to foster competition in the payphone market. They proved to be incapable of doing so and this Commission should give them no credence now with respect to implementing the 1996 Act.

Finally, the issue that this Commission must address in conjunction with Sec. 276 is the danger of the erection of barriers to entry. The valuation of the RBOC's payphone businesses indicates one such barrier -- the preservation of the former monopolist's advantages with respect to favorable sites and arrangements with state and local governments. The state and local government's role with respect to PIPs suggests another -- dictating certain requirements that will indeed translate into forcing PSPs to operate PIPs with ephemeral compensation

**EVERY ASPECT OF PSP USAGE SHOULD BE COMPENSABLE BASED ON A
NATIONAL STANDARD SET BY THE COMMISSION**

This commentator has already expressed its confidence in this Commission's ability to set national guidelines for payphone call compensation and the mechanism to ensure those national guidelines are implemented. Some of the views expressed in *NYSDPS* and *DoITT* that the states should set the per call prices should be rejected. Contrary to the position in *NYSDPS* (at p. 4), Congress by enacting the 1996 Act and Sec. 276 was expressly placing the Commission in the middle of payphone rate-making. Congress did not mandate how and what the Commission should do with respect to rates, but it clearly appreciated that both local, intrastate, and interstate usage

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required the examination and possible Commission intervention in all aspects of payphone rates in order to achieve fair compensation.

Furthermore, the fact that the states have been in the business of intrastate payphone compensation rate-making (*NYSDPS*, pp. 5-6) and have interests beyond "pro-competitive concerns" (*id.*, at 4), should send a clear warning to this Commission not to surrender to state and/or regulators any parameter setting aspect of payphone rate regulation. It is true that state and local payphone regulators may have to be involved in permitting higher rates than a national average or floor; for example, PSPs in New York City may have to pass on to the public higher rates because of the additional regulatory burdens its franchise law and other regulations (having a licensed general contractor supervise the drilling of holes in the sidewalk for pedestals, removing graffiti, and cleaning PSPs at regular intervals each month). No explanation is offered by the regulators of New York State or New York City why this Commission could not create mechanisms in a national framework to account for the differences in state and local markets.

Finally, it must be noted in this regard that it is no accident that the move to free market pricing in the provisioning of payphone service was a result of national initiatives formulated by Congress. While a few state regulators have implemented more competition oriented regulatory frame-works with respect to payphones, most have not. Thus, why would anyone think that such regulators would be better able to implement such competitive pricing structures than this Commission?

The telecard industry's proposals with respect to per call compensation should be

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discounted. This industry has been the beneficiary of cost free service on the equipment of PSPs for a number of years. Such an industry is now naturally concerned that it will suffer a dramatic loss in revenue and profits if businesses in this industry have to pay those that provide essential elements for originating such calls for the real cost of use.

Since the passage of TOCOSIA, the pre-paid phone card industry has enjoyed a government sanctioned, cost free incentive to promote its services, which may have otherwise been uneconomic. The pre-paid card industry has not only achieved market share at the direct loss in business to the PSPs, but gained additionally by means of the free use of PSP equipment. The claims by Intellicall and the International Telecard Association relating to the potential harm to their business (as a result of per call compensation) have no merit. Section 276 simply mandates that such businesses will have to pay their fair share for the use of an element for network access, i.e., the payphone. The fact of the matter is that when an individual uses a telecard at a payphone there is a cost to the owner of the payphone for the call completed to the access network. From the perspective of the payphone owner, what should it matter that the caller could not complete the call to the ultimate recipient. Does the 800 carrier waive its charges if a card is declined or the caller is not connected for any reason? A call was made and there was an associated cost to the payphone owner. Some person or entity should pay. If such a payment means that the telecard industry will make less revenue or ultimately may disappear because it no longer can pay its fair freight, then under the dynamics of the free market, it deserves its fate.

To add insult to injury, Intellicall suggest the compensation to the PSP might be

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achieved by means of a subscriber line charge without considering that compensation might more fairly be obtained by charging their own pre-paid card holders. Moreover, while expressing concern about potential fraud by use of auto-dialers or other devices, Intellicall and the International Telecard Association conveniently gloss over their industry's likely eleventh hour flooding the market with new cards ineligible for call compensation during their proposed transition period to some form of compensation.

However, notwithstanding past inequities, some arguments, including those advanced by the PCIA, with regard to a direct user payment of a set use fee are compelling under certain circumstances. If a consumer wants to access a toll free subscriber, the consumer has a choice of using a payphone or a business or residential phone. No one is forced to use a payphone. Thus, as between the subscriber and the consumer, the additional burden of fair compensation for the PSP should not be placed on the subscriber, but rather, on the consumer. The most convenient and efficient means for a consumer to thus make such a call would be through the use of coin. Furthermore, AT&T's assertion, *AT&T*, p. 12, that the value to the consumer of "800" service will be diminished if a coin aspect is introduced, is unsupported by any concrete evidence other than their lawyers' speculation.

Thus, the use of coin in conjunction with telecard 800 access and 800 subscriber service is preferable upon the balancing of ease of call access and fair compensation to the PSP. On the other hand, compensation for access code calls may continue on a carrier pays basis using the existing dial around call compensation process. Should any pre-paid card issuer choose to adopt

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an access code method, they are free to do so.

The views of some of the long distance carriers that the real cost of a call made by use of a "1-800" access number for long distance calls could cost the PSP as little as \$.085 is preposterous. The fact of the matter is that the real cost for just local usage probably lies somewhere between \$.35 and \$.50 for a call of average length and duration. Thus, the notion that a long distance call of probably greater than average length would cost less than a dime is absurd.

Finally, the view that even "411" calls deserve compensation is correct and suggests a more precise view as to how compensation for payphones should really be structured. (*See, RBOC*, p. 5). If a PSP incurs a direct cost for a call, and loses the time that the phone might otherwise be in use, then such a cost should be borne by the beneficiary of such a call. It is unfair to have the owner of the PSP incur the cost of that call. If the party that most clearly derives a benefit from the use of a payphone is the consumer, then the consumer should pay for the use of the PSP. If the party that is the ultimate beneficiary is the carrier, then the carrier should pay. This Commission should not be taken in by those that say that the public's expectations about what payphone usage should cost will be horribly dashed by the public's having to pay the fair share of what is otherwise an appropriate cost allocation. It should not be forgotten that the device is called a payphone, not a free phone. *See, PLA*, p. 4.

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**THE INVOLVEMENT OF THE STATES AND LOCALITIES WITH RESPECT TO
SETTING THE COMPENSATION FOR PUBLIC INTEREST PHONES SHOULD BE
KEPT TO A MINIMUM, EXCEPT IF THEY ARE THE PARTIES THAT WILL PAY
FOR THE SERVICE**

The provisioning of PIPs is a service. Someone has to pay for the service. If the provisioning of the PIPs will not support the service itself, then some form of fair compensation must be in place. If this Commission does not mandate such fair compensation, it is submitted that the States and/or localities will not provide such fair compensation. Rather, the states and localities will make the provisioning of PIPs a pre-condition to the privilege of use of their respective inalienable properties. For example, New York City's payphone franchise authorizing resolution does not make the provisioning of PIPs necessarily a voluntary proposition. The Resolution contains a minimum threshold of 25 payphone ownership in operation on the City's inalienable property. One reason for this barrier to entry (which is likely violative of the 1996 Act) is the necessary threshold to require PSPs to place and operate PIPs. Furthermore, the City's suggestion that placing PIPs will be compensated by reducing the franchise fees and commissions that will otherwise have to be paid at other, non-PIP sites, *DoITT*, pp. 5-8), underscores the lack of reality that a local regulatory agency has with respect to fair compensation. A local or state regulator has a toll keeper's mentality -- you should pay because I am providing you with a great privilege. What the 1996 Act recognizes and mandates is that a service provider should be fairly compensated for providing service by those recognizable entities that use the service. PIP compensation should not be the license for which an entity does business. In this regard, the suggestion that the locality or

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state pay for the service through a competitive bid mechanism is perhaps the fairest way to truly have the entity that requires the service pay for it. *RBOC*, p. 45-47.

RECLASSIFICATION OF INCUMBENT LEC-OWNED PAYPHONES

In order to accurately position the payphone market for competition, this Commission must recognize that the cost accounting of equipment set forth in its decision in *Computer III* does not take into account certain benefits that exist appurtenant to the payphone. The most dramatic is the right to be at a particular site, and, with respect to much of the inalienable property of localities and the states, the best sites in town. For example, in New York City, only until this year was the right of entities, other than the Regional Bell, to be sited at the curb officially recognized. Thus, until this year, only NYNEX, with some few, limited exceptions, was permitted to site payphones at the curbs of the streets of the City of New York.

In addition, despite Mayor Rudolph Giuliani's "clear corner" policies, NYNEX has been able to grandfather its preferred sites at the corners or near corners of Manhattan. With its expected granting of a non-exclusive franchise, NYNEX will thus have the very best sites in Manhattan (and probably, the United States) for the next fifteen years, and all merely because the City Council refused until 1995 to recognize any other payphone providers rights to exist at all. Should not such benefits of license, site contract, and franchise be factored into the valuation of the monopolist's former assets. This is not rocket science. The valuation of streams of income from

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leases (whether of real property or films) is done every day by accountants the world over, including those from Arthur Andersen. It is simply unfair not to take into account the total value of an active payphone. Furthermore, the Regional Bells and AT&T have used their name recognition to unfairly characterize to the public the nature of the public service offered by their payphone competitors. (See the advertisements of NYNEX on New York City buses, "Brand X, NYNEX;" and AT&T's similar advertisements, "No Name Phone.") It is not suggested here that this type of advantage will be easily calculated and rendered into an economic value. But, it should suggest that mere equipment valuation is wholly inadequate under the circumstances.

**PROTECTING SECTION 276 FROM BARRIERS TO ENTRY ERECTED BY STATE
AND LOCAL GOVERNMENTS**

The recently enacted payphone franchise legislation of the City of New York has been formally introduced to this Commission. See, *DoITT*, pp. 6-7. However, only selected excerpts have been quoted. The entire legislation is annexed hereto for the Commission's convenience. As the Commission will see, the City of New York has decided that if you merely own and operate one payphone, you will be ineligible to obtain a franchise to operate payphones on the streets of New York. How can such a barrier to entry survive in light of the 1996 Act? It is submitted that it cannot. The 1996 Act expressly rejected the view that any part of the nation would be immune from new entrants, no matter how small the quantity of their entry. Furthermore, the New York City statute provides that the City will evaluate the financial, economic, technical, and managerial

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expertise and wherewithal of potential franchises to determine if they are eligible for a franchise. It is submitted that operating a payphone or a group of payphones is a capitalistic enterprise that does not require the evaluation of government as to how to stay in business or how to do the business in order to make money. The free market is what does it and does it best.

This is exactly what Congress recognized in enacting the 1996 Act. Payphone operations are not the stuff of rocket science; it is a form of telecommunications business, easier than most. Thus, when and if cities and states take the position that their value judgement should replace those of the market as to what entities can compete where, this Commission should take note and apply the letter and spirit of the 1996 Act to prevent such restriction on competition in the market. New York City and New York State are not unique. They are just regulatory regimes regarding payphones from the former universe of regulation and limited entrants and competitors. The 1996 Act changed all that and this Commission, in the process of implementing Section 276, must be cognizant of the limitations of those schooled in the old ways.

CONCLUSION

For all these reasons, it is respectfully submitted that the Commission should apply a basic standard with regards to the implementation of Section 276 of the 1996 Act that PSPs should receive free-market based compensation for the use of their property and the provisioning of payphone service. Barriers to entry erected by state and local governments should not be permitted

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to interfere with the implementation of Section 276 and the creating of a level playing field in the market for payphone service.

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APPENDIX A

**Copy of New York City's Payphone
Franchise Authorizing Resolution**

Reports of the Committee on Land Use

Amended Res. No. 439-A

Report of the Committee on Land Use in favor of approving resolution authorizing franchises for the installation of public pay telephones and associated equipment on, over and under the inalienable property of the City.

The Committee on Land Use to which was referred on June 22, 1995 (Minutes, page 2123) the annexed Land Use resolution respectfully

REPORTS:

To promote the public interest, enhance the health, welfare and safety of the public and stimulate commerce by assuring the wide spread availability of reliable public pay telephone service.

Accordingly, your Committee recommends its adoption, as amended.

Proposed amended authorizing resolution submitted by the Mayor pursuant to Section 363 of the Charter for the granting of franchises for the installation of public pay telephones and associated equipment on, over, and under the inalienable property of the City.

By Council Members Eisland and McCaffrey (at the request of the Mayor); also Council Members Dear, Fields and Ruiz.

New matter is underlined. Matter to be deleted is [bracketed].

COUNCIL MINUTES--STATED MEETING AUGUST 17, 1995

CC11

...with the installation, construction, operation, maintenance, repair, upgrade, removal or destruction of such public pay telephones and associated equipment, and under the immediate supervision of the city engineer that such work be done by electricians, the franchisees shall employ and utilize only licensed electricians.

(10) (12) there shall be provisions guaranteeing the agreements required pursuant to paragraph 6 of subdivision (9) of Section 343 of the Charter relating to collective bargaining and other matters;

(10) (13) there shall be provisions requiring all franchisees to comply with all applicable City, state and federal laws, regulations and policies.

(11) (14) there shall be provisions to ensure the adequate oversight and regulation of all franchisees by the City;

(12) (15) there shall be provisions to restrict the assignment or other transfer of the franchise without the prior written consent of the City and provisions to restrict changes in control of the franchise without the prior written consent of the City. Such consent shall not be withheld unreasonably;

(13) there shall be provisions to require the franchisees to comply with the applicable provisions of the Americans with Disabilities Act and any additional applicable federal, state and local laws relating to accessibility for persons with disabilities, and at least 25 percent of such franchisees' telephones shall be equipped with volume control, equipment to enable hearing impaired persons to receive and utilize telecommunications services. The franchise shall make a good faith effort to distribute the volume control telephones evenly;

(13) (12) there shall be provisions to protect the City's interests in the event of a franchisee's failure to comply with the terms and conditions of the agreement;

(14) there shall be provisions to protect the City's interests in the event of the subsequent invalidity of any portion of the agreement and in the event of any changes in applicable law;

(14) (13) all franchisees shall submit to the City's Vendor Information Exchange System ("VINDEX") and the Integrated Comprehensive Contract Information System ("ICCIS");

(15) (20) all franchisees shall obtain all necessary licenses and permits from and comply with all Rules and Regulations of the New York State Public Service Commission, the Federal Communications Commission and any other governmental body having jurisdiction over the franchise;

(21) all franchisees shall obtain the permit(s) required by Section 21-002 of the Code. The fee used to obtain said permit shall not be considered in any manner to be compensation or in the nature of a fee;

(16) (21) all franchisees shall establish and maintain adequate security systems to protect the franchisee's equipment;

(17) (22) all franchisees shall establish and maintain prompt and efficient complaint handling procedures;

(23) there shall be provisions for inspecting and clearing the public pay telephones and for the prompt removal of graffiti. Such inspection, clearing and graffiti removal shall be a minimum of twice per month;

(18) (23) all franchisees shall establish and maintain a program, acceptable by the City, to monitor the operability of its equipment at all times at all locations;

(19) (24) in the event of an outage, the extent of which is under the direct control of the franchisee(s), (a) the franchisee(s) shall be required to restore service within twenty-four (24) hours or to keep the service as affected to the extent of an outage within twenty-four (24) hours, if the extent of the outage is not under the direct control of the franchisee(s), the franchisee(s) shall notify the responsible party and the Commissioner within twenty-four (24) hours;

(20) (22) all franchisees shall ensure that not more than two percent (2%) are out of service at any given time;

(21) (23) there shall be provisions preserving the right of the City to perform public works or public improvements in and around areas subject to the franchise;

(22) (24) there shall be provisions requiring the franchisee(s) to protect the property of the City and the delivery of other public services from damage or interruption of operation resulting from the installation, construction, operation, maintenance, repair, upgrade, removal or destruction of the equipment or facilities related to the franchise;

(23) (25) there shall be provisions designed to minimize the extent to which the public use of the streets of the City is disrupted in connection with the installation, construction, operation, maintenance, repair, upgrade, removal or destruction of the equipment and facilities related to the franchise(s);

(24) (31) there shall be provisions requiring that: (i) emergency calling to the 911 emergency number, (and) in the (reverse) qualified emergency situation scenario and to any other appropriately numbered emergency number be in conjunction with the rules and regulations promulgated by the Public Service Commission (shall be available without use of a coin and (ii) the franchisee must dial the digits "911" and "C" directly into the local network with no delay for 911; and

(25) there shall be a provision, consistent with such regulations as may be promulgated by the New York State Public Service Commission, requiring that each public pay telephone clearly and legibly (i) identify the owner within proximity of such public pay telephones, (ii) indicate that the number under service has been supplied by the City of New York and (iii) provide such telephone numbers as may be required by the department where complaints regarding the telephones may be directed.

The department shall develop a process for consultation with Council Members and Community Boards with respect to the siting of public pay telephones and associated equipment, including requests for removal or relocation. This process shall include, but not be limited to:

(1) attending Council Members and Community Boards in relation to the department's siting of public pay telephones, related services, or a change in service;

(2) notifying the department in writing the applications received under Section 21-002 of the Code for siting for public use; and

(3) notifying the Commissioner in writing in connection and response received from Council Members and Community Boards regarding siting of services, removal or relocation of public pay telephones pursuant to the Commissioner's policies under the Code.

The Department of Telecommunications and Energy shall file the following documents with the Council:

(1) within fifteen (15) days of filing or receipt a copy of all documents, including but not limited to forms, applications, reports and correspondence regarding Section 21-002 and 21-003;

(1) (2) within fifteen (15) days of issuance, a copy of each RFP or other solicitation issued pursuant to this resolution;

(2) (3) within fifteen (15) days of approval by the Mayor, a copy of the agreement for each franchise granted pursuant to this resolution, and any subsequent modification thereof; and

(3) (4) on or before July 1 of each year, for the preceding calendar year, a report detailing the revenues received by the City from each franchise granted pursuant to this resolution.

JUNE M. ISLAND, Chairperson; ARCHIE SPIGNER, SHELTON S. LEFFLER, NOACH DEAR, HEROME X. O'DONOVAN, WALTER L. MCCAFFREY, C. VIRGINIA FIELDS, KENNETH E. FISHER, THOMAS DUANE, ADAM C. POWELL IV, MICHEL J. ABEL Committee on Land Use, August 17, 1995.

On motion of the Speaker (Council Member Vallee), and adopted, the foregoing matter was adopted as a General Order for the day. (See ROLL CALL ON GENERAL ORDERS FOR THE DAY.)